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Hulin v. Fibreboard Corp.—In Pursuit of a Workable Framework for Adjudicative Retroactivity Analysis in Louisiana

I. WHEN MIGHT THE ISSUE OF JUDICIAL RETROACTIVITY ARISE?— A BRIEF INTRODUCTION

In most instances, when a judge hands down an opinion, little attention, if any, is given to its temporal effect¹ by the legal community. This is so for a simple reason: courts generally apply settled legal principles which antedate the events giving rise to the dispute at hand.² But in a modern legal system, judicial rulings which augment or impact settled "law" in some manner will inevitably subsist,³ whether the court confronts an issue which is *res nova*,⁴ interprets legislation differently than did prior courts, or invalidates legislation based upon constitutional provisions. The paradigmatic case "aris[es] when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct."⁵ Therefore, consideration of the issue of adjudicative retroactivity has arisen primarily as an

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1. The term "adjudicative retroactivity" is utilized throughout this paper and refers to the temporal effect afforded a judicial decision. See *Succession of Clivens*, 426 So. 2d 585, 587 (La. 1983) (for the general proposition that judicial decisions are given both retroactive and prospective effect). A decision is given retroactive effect when it is applied to juridical acts and facts which predate the decision and give rise to legal consequences. This encompasses parties before the announcing court and pending cases within that jurisdiction. Implicit in the concept of precedent is the idea that a judicial decision operates prospectively upon causes of action which accrue in the future. But see S. R. Shapiro, *Comment—Prospective or Retroactive Operation of Overruling Decision*, 10 A.L.R. 1371, I §1 [a] (1967-1998 Supp.) (for the unusual case "involving purely prospective application . . . [wherein] the new rule is confined in its effect to future cases arising from fact situations occurring after the announcement of the new rule"). It is this last temporal application, the exception to the rule, which has caused the underlying legal theory to become unstable and incoherent, and so it follows that this paper will primarily focus upon decisions which deny or discuss the propriety of adjudicative retroactivity.

2. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534, 111 S. Ct. 2439, 2443 (1991).

3. But cf. discussion *infra* at Sections V. B & C, which assert that civilian and/or narrow (strict) constitutional interpretation do not admit to conflicts in time between successive judicial rulings. Of course, one should bear in mind that the topic of adjudicative retroactivity would hold little interest if these interpretive approaches did not manifest some deficiencies when held up to practical, observable treatment by courts and lawyers.

4. See La. Civ. Code art. 4: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."

5. *James B. Beam Distilling Co.*, 501 U.S. at 534, 111 S. Ct. at 2443. In legal scholarship, this is often referred to as an overruling decision. Aside from constitutional overrulings, there is a simple way to differentiate a judicial overruling from ordinary judicial interpretation. In the first instance, the court interprets legislation differently than it had on previous occasions. In the second, there is a consistent or first interpretation of legislation.

intuitive or emotive appeal to concepts of notice and reliance, e.g. that it is "unfair to judge parties according to law of which they could not have known."⁶ Retroactivity analysis attempts to confront problems such as this by providing guidance as to the appropriate temporal limitations for legal transformation.⁷ Unfortunately, however, efforts to formulate a consistently accepted, workable model within which to analyze the temporal effects of judicial decisions continues to frustrate jurists and United States Supreme Court Justices alike.⁸ Louisiana is no stranger to this struggle into which the recent decision of *Hulin v. Fibreboard Corp.* now thrusts its bold, *Erie* assertions.

II. A BRIEF FORWARD AND SURVEY OF THIS PAPER

While reading, one may be surprised at the interconnectedness of this topic to such studies as the history and philosophy of law,⁹ comparative law¹⁰ and political science.¹¹ Because of this multifaceted nature, the paper was tailored around *Hulin*, both to impart structure and to limit its amorphous character.¹²

6. Kermit Roosevelt, III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 Conn. L. Rev. 1075, 1115 (1999). Typically, the presence of a disruptive interpretation or overruling decision is required to trigger temporal analysis. See also Jill E. Fisch, Comment, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1084-85 (1997) ("Commentators have suggested that fair retroactivity rules should provide notice of applicable legal standards and protect reliance interests. . . . The justice of a legal system is what gives its rules legitimacy. Notice enables people to predict the consequences of their transactions and increases the influence of legal rules upon primary conduct.").

7. See Fisch, *supra* note 6, at 1056. Compare J. R. Trahan, *Time for a Change: A Call to Reform Louisiana's Intertemporal Conflicts Law (Law of Retroactivity of Laws)*, 59 La. L. Rev. 661 (1999) (for a treatment of this subject in the legislative context).

8. See Roosevelt, *supra* note 6, at 1104 (which surmises that:

[t]he general dissatisfaction with the Court's retroactivity jurisprudence has not produced a corresponding consensus on the appropriate alternative. One scholar seems to think there is no problem; others believe that the question of retroactivity is best understood as a question of remedies; still another suggests that retroactivity analysis should be guided by a model of equilibrium drawn from physics.).

9. Undoubtedly, numerous wine glasses have been emptied over enigmatic topics such as when and if jurisprudential rulings become law, whether the Montesquian idea that the judge is simply the oracle of the legislature frustrates the development of law (i.e. whether it shackles creative interpretation such as that espoused by Geny's Free Scientific Research method), and to what extent Louisiana is a mixed jurisdiction (civil or common law).

10. Broad topics like the methodology of judicial interpretation and the role of precedent in Louisiana lend themselves to an examination of the different approaches of civil, common or constitutional law.

11. Political structure is relevant to an examination of the role of the judicial branch.

12. This paper will not address the following: 1) Retroactivity of legislation—unless noted, assume that adjudicative retroactivity and not legislative retroactivity is being discussed, as the two are very different in theory and operation; 2) Constitutional issues involving the Due Process, Takings, Ex Post Facto and Contract Clauses—though these clauses may have appeal when reliance interests are shattered, U.S. Supreme Court rulings have given little consideration in recent years to the operation of these venerable clauses in conjunction with legislative retroactivity, much less adjudicative retroactivity. 3) Criminal law—this paper will focus primarily upon private law adjudication. Criminal

The following represents a general survey of this paper. Part III.A analyzes the basic facts and holding of *Hulin*. Part III.B explores the *Erie* mandate. Part IV examines the federal district court's decision in *Hulin*, beginning with an explication of its decision in IV.A, pointing out its deficiencies in IV.B, and then offering an alternative approach in IV.C. Part V analyzes the federal court of appeals' opinion, first pointing out its insufficient treatment of the Louisiana jurisprudence in V.A, next examining its characterization and use of the U.S. Supreme Court's decisions in V.B, and finally looking at the opinion's use of civilian doctrine in V.C. Part VI takes the reader into some related topics. VI.A deals with a recently developed retroactivity framework, which appears to repackage the civilian and Blackstonian models, but may represent some further developments. Part VI.B discusses legal mechanisms which greatly limit the impact of adjudicative retroactivity. These may represent an end to one's temporal inquiry and allow one to even entertain the possibility of absolute (or maximum) retroactivity of judicial decisions. Part VI.C leads one into a basic discussion of policy and the role of the judicial branch. As expected, the final section, Part VII, furnishes the conclusion.

III. LOUISIANA'S LATEST SEMINAL CASE—*HULIN V. FIBREBOARD CORP.*

A. *Facts and Holding*

Hulin centered on a wrongful death action attributable to lung cancer. The plaintiffs sued various asbestos manufacturers and a cigarette manufacturer (American Tobacco Company) under a dual causation theory, utilizing theories of strict liability, ultrahazardous activities, and negligence. Six weeks after the complaint was filed, the Louisiana Supreme Court decided *Halphen v. Johns-Manville Sales Corp.*,¹³ which revolutionized (or consolidated) product liability law and established a theory whereby a plaintiff need only prove that a product is unreasonably dangerous *per se*. This burden of proof was derived through an interpretation and application of various Louisiana Civil Code articles in conjunction with jurisprudence.¹⁴ The test was articulated as follows: "A product is unreasonably dangerous *per se* if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product."¹⁵ This category of products was said to give rise to "the purest form of strict liability."¹⁶

law involves a different set of considerations, such as fear of the release of large numbers of prisoners, drain on the judicial system, habeas corpus, and the implication of various constitutional concerns.

13. 484 So. 2d 110 (La. 1986).

14. See *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 325 (1999) (which asserts the court "applied its previously developed products liability jurisprudence and, by analogy, as it had done in *Hunt* and *DeBattista*, the principle of legal fault or strict liability under Civil Code articles 2317-2322.").

15. *Halphen*, 484 So. 2d at 114.

16. *Id.* at 115. (This category was "clearly distinguished from other theories in which the manufacturer's knowledge or conduct is an issue." *Id.*).

After *Halphen*, the plaintiffs in *Hulin* prudently amended their complaint to include a product liability claim, alleging that tobacco was unreasonably dangerous *per se*. The Middle District of Louisiana found that the cause of action in *Hulin* accrued before *Halphen* was decided and that this theory of liability could not be retroactively applied because "the creation of the 'per se' theory of products liability [by the supreme court in] *Halphen* was a substantive change in the law."¹⁷ Thus, the plaintiffs had run out of applicable claims and the defendants were granted a motion for summary judgment.

On appeal, the basic issue, as characterized by the Court of Appeals for the Fifth Circuit, was whether to retroactively apply the *per se* theory of product liability law, a judicial creation of the supreme court in *Halphen*, to causes of action which accrued before the date of that decision. The court held that,

The Louisiana Supreme Court's decisions firmly establish the principles that under the state constitution and the Civil Code, courts do not make law but interpret and apply law made by the Legislature or derived from custom. In accord with those principles, the state's highest court has held that when it interprets the law in deciding a controversy between litigants in one case, that decision becomes the controlling interpretation of state law and must be given full retroactive effect in all other cases, unless the court declares otherwise or such application is barred by prescription or *res judicata*.¹⁸

Accordingly, the decision of the lower court was reversed and on remand the district court was to retroactively apply *Halphen* and the *per se* theory.¹⁹

B. The Erie Mandate

It is a bit surprising that the latest decision asserting a bold characterization of adjudicative retroactivity in Louisiana arose out of a federal appellate court; but then again Judge Dennis, former Justice of the Louisiana Supreme Court and author of many precedent-setting opinions, is the author.²⁰ In *Hulin*, both the federal district court and court of appeals were required to follow the rule of *Erie Railroad Co. v. Tompkins*²¹ that, "a federal court sitting in diversity jurisdiction and called upon in that role to apply state law is absolutely bound by a current interpretation of that law formulated by the state's highest tribunal."²² So

17. *Hulin v. Fibreboard Corp.*, 966 F. Supp. 428, 436-37 (M.D. La. 1996).

18. *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 317 (5th Cir. 1999).

19. *See Hulin*, 178 F.3d at 334.

20. *See, e.g.*, *Billiot v. B.P. Oil Co.*, 645 So. 2d 604 (La. 1994); *Succession of Lauga*, 624 So. 2d 1156 (La. 1993); *Clomon v. Monroe City Sch. Bd.*, 572 So. 2d 571 (La. 1990); *Moresi v. Dept. of Wildlife & Fisheries*, 567 So. 2d 1081 (La. 1990); *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228 (La. 1989); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985); *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331 (La. 1978).

21. 304 U.S. 64, 58 S. Ct. 817 (1938).

22. *Daigle v. Maine Med. Ctr., Inc.*, 14 F.3d 684, 689 (1st Cir. 1994).

inevitably one must ask whether the two federal courts accurately followed their mandate. If the following issue of adjudicative retroactivity had been certified to the Louisiana Supreme Court, would its answer have comported with either the federal district or appellate court decisions?

IV. THE FEDERAL DISTRICT COURT'S OPINION IN *HULIN*

A. *An Explication of the Court's Reasoning*

The district court confined the temporal effect of judicial interpretation in *Hulin*²³ by utilizing a distinction grounded in legislative retroactivity analysis. The court began by noting, with astonishment, that at least twenty prior cases in Louisiana had "applied the 'per se' theory to causes of action arising before *Halphen* was decided . . . [and that] none of these courts ever directly addressed the issue of whether the 'per se' theory should be applied retroactively. Instead, each court merely applied the *per se* theory without comment and apparently without objection from the parties."²⁴

The district court chose to tackle the retroactivity issue. In doing so it relied heavily upon *Young v. Logue*,²⁵ a recent case arising out of the Louisiana Fourth Circuit Court of Appeal, which denied retroactive application of *Halphen*. Both cases hinge the retroactive application of *Halphen* upon its characterization as either substantive or procedural law, since "[s]ubstantive laws are presumed to apply prospectively only."²⁶

Both courts found that the theory announced in *Halphen* altered substantive rights and could not be retroactively applied.²⁷ Characterization of the unreasonably dangerous *per se* theory as substantive law was primarily based upon an analogy to the Louisiana Supreme Court's holding in *Gilboy v. American Tobacco Co.*²⁸ In *Gilboy*, the court held that the Louisiana Products Liability Act (LPLA),²⁹ which was designed to overrule *Halphen*, was substantive law and therefore could not be retroactively applied.³⁰

One may ascertain that both courts are asserting a functional argument. If a judge "divines" a whole area of product liability law out of jurisprudence and

23. *Hulin v. Fibreboard Corp.*, 966 F. Supp. 428 (M.D. La. 1996).

24. *Id.* at 432-33.

25. 660 So. 2d 32 (La. App. 4th Cir. 1995).

26. *Hulin*, 966 F. Supp. at 433-34 ("[S]ubstantive laws either establish new rules, rights and duties or change existing ones." *Id.*, quoting from *Rousselle v. Plaquemines Parish Sch. Bd.*, 633 So. 2d 1235, 1244 (La. 1994)).

27. See *Young*, 660 So. 2d at 56-57 (in which the court states that *Halphen* was a new jurisprudential development and "did, in fact, alter the law of products liability in Louisiana and thus should not be applied retroactively"). See also *Hulin*, 966 F. Supp. at 436.

28. 582 So. 2d 1263 (La. 1991).

29. La. R.S. 9:2800.51-.59 (1997).

30. *Gilboy*, 582 So. 2d at 1264-65 (one should be aware that *Gilboy* concerned legislative retroactivity).

broad Civil Code articles, which looks and acts like a statute and which does in fact alter legal rights, why not analogize to the reasoning in *Gilboy*?³¹ Otherwise, it might appear that the judiciary is getting away with retroactively applying its own substantive brand of "law," while barring the legislature from similar action, all under the guise of legal theory.³² These judges may be frustrated with the inability of Louisiana legal theory to grasp the practical, observable treatment of jurisprudence in the courtroom, echoing a sentiment of Justice Oliver Wendell Holmes:

What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts . . . , that it is a system of reason But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms of deductions, but that he does want to know what the . . . courts are likely to do in fact. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.³³

You could substitute almost any legal client for the hypothetical "bad man." Parties involved in litigation generally want to know the outcome, not legal theory.³⁴

Independent from the pragmatic viewpoint above, it is not very perplexing to ascertain how the federal court in *Hulin* and the state court in *Logue* pirated the substantive/procedural distinction into the realm of adjudicative retroactivity. Once one divorces the jurisprudence surrounding legislative retroactivity from its statutory base in Louisiana Civil Code article 6,³⁵ it becomes easier to overlook the necessity of legislation. Consulting *Gilboy*, one finds unsurprisingly, but disturbingly, that Article 6 was never mentioned in the opinion, rather a string of jurisprudence was placed in its stead.³⁶

31. See *Young*, 660 So. 2d at 57:

[T]he supreme court opined that *Halphen's* theories of recovery are substantive rights that cannot be retroactively revoked by the Act. Thus, . . . just as *Halphen's* theories . . . cannot be denied to a plaintiff whose cause of action arose prior to the Act, neither can those theories be applied to cases where the cause of action arose prior to *Halphen* in 1986.

32. It is interesting that Justice Dennis was the author of *Halphen* from the state bench and has now resurrected *Halphen's* applicability in *Hulin* from the federal bench.

33. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897).

34. The predictability of the "result" is generally based upon the stability of the law, which is correlative to the development of a rational, comprehensive system of legal reasoning grounded in a statutory scheme and/or judicial interpretation (jurisprudence).

35. La. Civ. Code art. 6 provides: "[I]n the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary."

36. See generally *Gilboy v. The American Tobacco Co.*, 582 So. 2d 1263, 1264-65 (1991). Judicial decisions should purport to have their grounding in the Louisiana Civil Code or some other statutory source. Omissions such as these are part of the reason that confusion arises in the jurisprudence. Also at work is a semantic shift. Many cases refer to substantive "rights," not substantive "laws," which might facilitate use of this legislative distinction in adjudicative retroactivity analysis.

B. The District Court Erred

The Fifth Circuit Court of Appeals stands upon firm legal ground in refuting the lower court's analysis and reasoning. The district court, in its analysis, lost sight of the theoretical underpinnings of Louisiana judicial decisions, which generally provide that:

[T]he decisions of a court of last resort are not the law, but only the evidence of what the court thinks is the law. The law as construed in an overruled case is considered as though it had never existed, and the law as construed in the last case is considered as though it has always been the law. As a general rule, the law as construed in the last decision operates both prospectively and retrospectively. . . .³⁷

When delving into distinctions about whether the unreasonably dangerous *per se* product liability theory announced in *Halphen* was substantive or procedural law, the *Hulin* lower court cited cases which, with the exception of *Young v. Logue*, dealt with retroactivity of legislation.³⁸

All these cases were based upon Article 6.³⁹ Of particular importance is the article's use of the word "laws." The Louisiana Civil Code, in keeping with its continental siblings, expressly states in Article 1 that, "[t]he sources of law are legislation and custom," *a contrario sensu*, not jurisprudence.⁴⁰ Whether one calls judicial precedent thunderous commands from Mount Olympus or those written statements that most Louisiana lawyers rely upon when researching an issue, it is not contemplated as "law" pursuant to Article 6. Also, if Article 6 were to apply to judicial decisions, the phrase "unless there is a legislative expression to the contrary" would be rendered perplexing and superfluous.

Fortunately, though not specifically referring to Article 6, the Louisiana Supreme Court did ultimately clarify that it was referring to the temporal effects of

37. *Norton v. Crescent City Ice Mfg. Co., Inc.*, 178 La. 135, 145, 150 So. 855, 858 (1933).

38. Interestingly, even if the substantive/procedural distinction were analogized to judicial overrulings, the conclusions reached would be opposite. See Shapiro, *supra* note 1, at ¶ 5 [a]:

[R]etroactive application of an overruling decision has been denied where the court has found that "procedure" was involved, but retroactive application of an overruling decision has been permitted where the court has found that "substantive law" was involved. . . .

[U]nder the classical theory rights embodied in a newly announced judicial rule are deemed to have always been in existence, to deny such a rule retrospective effect would deprive the holder of the right of its benefit, as would be the case if a statute eliminating a pre-existing right were given retrospective effect.

Cases in the common law bear this out, *see, e.g.*, *Sheperd v. Consumers Co-op Ass'n.*, 384 S.W.2d 635 (Mo. 1964); *Curtis v. Barby*, 366 P.2d 616 (Okla. 1961); *Moore v. Ready Mixed Concrete Co.*, 329 S.W.2d 14 (Mo. 1959).

39. For the text of La. Civ. Code art. 6, *see supra* note 35.

40. See La. Civ. Code art. 1, cmt. (b): "According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom."

legislation in *Gilboy*, and not judicial interpretation, with the declaration that, "A statute that changes settled law relating to substantive rights only has prospective effect."⁴¹

Therefore, even if one is pragmatic in nature, *Gilboy* was the wrong case to analogize and the substantive/procedural distinction was an erroneous route to take when approaching judicial retroactivity. There is no statutory, jurisprudential or logical reason for incorporating this imprecise, ambiguous distinction.⁴²

C. *What Could the Federal District Court Have Done?—A Brief Examination of the Jurisprudence*

1. *Louisiana Jurisprudence*

An examination of the Louisiana jurisprudence reveals that there is an alternative course by which the court could have arrived at its functionalist result. Though as of late, the populace, media and courtrooms of the United States appear to have little empathy for the litigative plight of cigarette manufacturers, there is an equitable argument to be made on their and other manufacturers behalf. Before *Halphen*, manufacturers had a stronger shield residing in the interpretative formulations of products liability law. After *Halphen*, these companies became more vulnerable to litigation. Approximately two years later, after the LPLA went into effect, it seemed that they were back under the more fortified protection of the law. That two year hiatus, instigated by the judiciary rather than the legislature, led to the result-oriented conclusion that all product liability suits arising before September 1, 1988 (the effective date of the LPLA) were governed by the unreasonably dangerous *per se* theory and other characterizations of product liability law announced in *Halphen*. So now courts are stumbling over cases such as *Hulin*, in which legislation that was written almost ten years earlier (the LPLA) is not being applied.⁴³ Product manufacturers had no advance warning that plaintiffs were about to become fully armed with the *per se* theory⁴⁴ and to have *Halphen* apply retroactively could have led to some very improper business risk assessments, severe underinsurance and underfinancing.

Mindful of this, the district court could have explored Louisiana decisions which have recognized and acted upon a realization of temporal conflict between judicial interpretations in the private law.⁴⁵ The Louisiana Supreme Court's

41. *Gilboy v. The American Tobacco Co.*, 582 So. 2d 1263, 1265 (1991) (emphasis added).

42. See generally Trahan, *supra* note 7, at 706 (for the proposition that Louisiana's current legislative retroactivity law, utilizing the substantive/procedural distinction, is seriously deficient in theory and application).

43. See, e.g., *Toups v. Sears, Roebuck and Co., Inc.*, 507 So. 2d 809 (La. 1987) (*Halphen* was heavily cited in the "LAW" section of this opinion, in a case where the injury dated back to 1977.).

44. See William E. Crawford & David J. Shelby, II, *Torts*, 53 La. L. Rev. 1011, 1014 (1993) (which stated that "the *Halphen* unreasonably dangerous *per se* claim becomes a formidable weapon against cigarette manufacturers due to the low social utility of cigarettes").

45. See, e.g., *In re adoption of B.G.S.*, 556 So. 2d 545 (La. 1990); *Bergeron v. Bergeron*, 492 So. 2d 1193 (La. 1986); *Harlaux v. Harlaux*, 426 So. 2d 602 (La. 1983); *Succession of Clivens*, 426 So. 2d

decision in *Harlaux v. Harlaux*⁴⁶ stated, "generally, unless a decision specifies otherwise, or its retroactive application would produce substantial inequitable results, it is to be given prospective and retroactive effect."⁴⁷ Though there are few prospective decisions, many of the latest have been guided by *Lovell v. Lovell*,⁴⁸ which slightly adapted the U. S. Supreme Court's *Chevron Oil*⁴⁹ test:

In determining whether or not our decision should be given retroactive effect, three factors should be considered: (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the merits and demerits must be weighed in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation; and (3) the inequity imposed by retroactive application must be weighed.⁵⁰

The applicability of the *Lovell-Chevron* test to the facts of *Hulin* is unclear. Just because there have been multiple, intervening decisions between *Halphen* and *Hulin* does not subtract from the observation that at the time *Halphen* was decided, it was a decision which established a new principle of law that overruled clear past precedent.⁵¹ Factor (2) of the *Lovell-Chevron* test gets more complicated. One could arguably say that since "law" is to be derived from the legislature, and the legislature promptly overruled *Halphen*, that retroactive application would retard the legislature's intent. But this is looking to subsequent, rather than prior, history. Factor (3) is open to argument; perhaps some sort of cost-benefit analysis or other empirical evidence relating to risk assessment or insurance would be effective.

The most marked application of the *Lovell-Chevron* test in Louisiana was *Succession of Clivens*.⁵² Prior to *Clivens*, the Louisiana Supreme Court declared in *Succession of Brown*⁵³ that (former) Civil Code article 919, which effectively barred many illegitimate children from asserting inheritance rights in testate and intestate successions, was unconstitutional. It does not take great imagination to envision the possible upheaval that maximum retroactive application of this holding

585 (La. 1983); *Lovell v. Lovell*, 378 So. 2d 418 (La. 1979); *Jackson v. Doe*, 296 So. 2d 323 (La. 1974); *Barnett v. Develle*, 289 So. 2d 129 (La. 1974); *LeBlanc v. Henderson*, 259 So. 2d 557 (La. 1972); *Sumrall v. J.C. Penney Co.*, 239 La. 762, 120 So. 2d 67 (1960); *Succession of Lambert*, 210 La. 636, 28 So. 2d 1 (1946).

46. 426 So. 2d 602 (La. 1983).

47. *Id.* at 604 (paraphrasing *Cipriano v. City of Houma*, 395 U.S. 701, 89 S. Ct. 1897 (1969) and *Lovell v. Lovell*, 378 So. 2d 418 (La. 1979)).

48. 378 So. 2d 418 (La. 1979).

49. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971).

50. *Lovell*, 378 So. 2d at 422.

51. Of course, the opportunity for subsequent attack outside of the announcing opinion could be met with the classic open floodgates analogy (a judicial efficiency argument).

52. 426 So. 2d 585 (La. 1982).

53. 388 So. 2d 1151 (La. 1980).

could have upon succession and property law.⁵⁴ So the court promptly tackled the issue in *Clivens*, declaring that unlimited retroactivity of *Brown* would "work a substantial injustice" and "that the balance between all such factors" would best be served by a limited retroactive application to the effective date of the Louisiana Constitution of 1974.⁵⁵

Also of note is *In re Adoption of B.G.S.*,⁵⁶ in which the Louisiana Supreme Court denied retroactive application of its decision, which declared unconstitutional an adoption statute that purported to give the mother of an illegitimate child the power to terminate the father's parental rights without notice or an opportunity to be heard. The Court did not cite the *Lovell-Chevron* test or any other maxims of adjudication, rather it simply stated that given the strong interest in finality and stability in familial relations and "[c]onsidering the interests of justice, stability of institutions and administrative convenience we conclude that our due process interpretation shall be applied prospectively only, except that it shall have retroactive effect in the case at bar and in any case pending below"⁵⁷ This is a very notable decision, mostly because of its recentness, strong equitable component, lack of legal authority (including precedent), and its use of modified or selective prospectivity, which has been recently rejected by the U.S. Supreme Court.⁵⁸

2. A Glance at the Common Law

If the district court wanted to, it could have turned to other states and, while not very authoritative, it would have found that the common law is rife with cases limiting or denying the retroactive effect of judicial overrulings. A comprehensive analysis of the U. S. jurisprudence is provided in an American Law Report by S. R. Shapiro, in which this phenomena is demonstrated in many different areas of law, such as: torts,⁵⁹ abolition of immunities,⁶⁰ evidence, jury instructions, antitrust law, conflict of laws, damages, and insurance.⁶¹

A reliance argument would be fairly easy to articulate based on legal theories supplied by courts in the above areas, especially in common law jurisdictions where judicial decisions are officially recognized as giving shape and formation to

54. See *Clivens*, 426 So. 2d at 593-94. Consider reliance interests of heirs and third parties towards property, which may have been consumed or have changed hands numerous times.

55. *Id.* at 594, 600 (which also established that "states are free to limit the retroactivity of their civil decisional law when necessary and advisable." *Id.* at 594).

56. 556 So. 2d 545 (La. 1990).

57. *Id.* at 559 (Pending cases were further limited to those in which a "natural father . . . has filed a pleading asserting his interest in the child prior to an interlocutory decree of adoption." *Id.*).

58. See *infra* Part V.B.

59. *E.g.*, abolition of gross negligence doctrine, abolition of defense of assumption of risk, right of action for loss of consortium, contribution among joint tortfeasors, unconstitutionality of guest statute, contributory negligence and comparative negligence.

60. *E.g.*, charitable, governmental, parental, and inter-spousal immunities.

61. See generally Shapiro, *supra* note 1, at III, B, §§ 12, 13, 15-19, 22, 22.5, 24, 27.

the law through the operation of *stare decisis*.⁶² Even though mention of analogous cases from common law jurisdictions may carry little legal weight in Louisiana, it might be useful for demonstrating the equities and practicalities involved.

3. *Wrap Up*

Whatever one concludes as to the applicability of the *Lovell-Chevron* test to *Hulin*, an approach based upon equity (fairness, notice and reliance) and policy (efficiency or facilitating transitions between legal regimes) would have been a superior one to the procedural/substantive route taken by the federal district court.⁶³ The Louisiana cases cited amply demonstrate the viability of such an approach in the event that a difficult retroactive application of a creative or unsettling judicial interpretation is encountered. Of course, a great likelihood remains that in the vast majority of cases Louisiana's recognition of the declarative function of the judge, as reflected in *Hulin*,⁶⁴ and the presumption of retroactivity will circumvent such arguments. But at a minimum, such assertions will put pressure upon an appellate court to properly deal with the Louisiana jurisprudence and to perhaps articulate clear standards for approaching adjudicative retroactivity. Pressure of this sort was not applied to the *Hulin* appellate court.

V. THE FIFTH CIRCUIT COURT OF APPEALS DECISION

A. *The Court of Appeals Did not Adequately Reconcile its Decision with Louisiana Jurisprudence*

Judge Dennis appears to whitewash over Louisiana cases, which have consistently shied away from a rule of absolute retroactivity since 1946.⁶⁵ Two short paragraphs in *Hulin* discuss the jurisprudence, in which the primary point being made is that, "In the relatively small number of cases in which the Louisiana Supreme Court has limited the retroactive effect of its own decisions, it has expressly done so in the same opinion that announced the decision."⁶⁶

This assertion displays some hostility towards nonretroactive holdings by appearing to foreclose subsequent review by a later court of the temporal application of an earlier court. If one fails to raise the inequity of a judicial overruling in a particular case, later attempts in other forums could be struck down by simply quoting the language above. But how accurate is this characterization? The supreme court did not limit the retroactive effect of *Succession of Brown* until the later case of *Succession of Clivens*. This is a major Louisiana decision on the topic,

62. Accordingly, one generally finds a more marked embrace of prospective decisionmaking in common law jurisdictions than in Louisiana. See generally, Shapiro, *supra* note 1.

63. For a more thorough analysis of these principles see *infra* Part VI.C.

64. *Hulin v. Fibreboard Corp.*, 178 F.3d 316 (5th Cir. 1999).

65. See, e.g., cases cited, *supra* note 45 (which does not include criminal law decisions).

66. *Hulin*, 178 F.3d at 322.

which tends to rouse suspicion as to where one is being led.⁶⁷ After reading the opinion one is left with the impression that Louisiana embraces or is moving towards an absolutist approach in which the prospect of nonretroactive holdings will greatly diminish, if not disappear. Consider the following quote from *Hulin* concerning the retroactive application of *res nova* decisions:

In most cases . . . when the Louisiana Supreme Court interprets and applies Civil Code principles by analogy to cases unforeseen by the Code, the issue of the temporal effect of the decision is not raised, because it is so well understood that whatever the court now holds to be the law of the Civil Code becomes what has always been the law, even if the new holding overrules or modifies an earlier decision of the court.⁶⁸

Nevertheless, in the private law, the Louisiana Supreme Court has not expressly rejected the *Lovell-Chevron* test, nor has it since offered any formulative approach to the issue of adjudicative retroactivity; though there are fairly recent cases such as *In re Adoption of B.G.S.*⁶⁹ where the decision was denied full retroactive effect. But two very recent state court of appeal cases have applied the *Lovell-Chevron* test.⁷⁰ Surprisingly, subsequent review of these decisions by the Louisiana Supreme Court implicitly affirmed the *non-retroactive* application of both decisions, in which no comment was made upon the application of the *Lovell-Chevron* test.⁷¹

Considering the above, one could rather strongly assert that the Louisiana Supreme Court has continued, in certain cases, to entertain arguments which would limit retroactive application of judicial overrulings.⁷² This, despite *Hulin's* firm statement that "whatever the court now holds to be the law . . . becomes what has always been the law."⁷³ To date, the supreme court has not espoused anything as

67. Of course, a denial of subsequent attack outside of the announcing opinion could be bolstered with the opening of the floodgates analogy (judicial efficiency).

68. *Hulin*, 178 F.3d at 321 (emphasis added).

69. 556 So. 2d 545 (La. 1990). See discussion *supra* Part IV.C.

70. *Wheeler v. La. Dep't of Transp. & Dev.*, 675 So. 2d 788 (La. App. 4th Cir.), *rev'd*, 679 So. 2d 1363 (La. 1996); *Magee v. Landrieu*, 653 So. 2d 62 (La. App. 1st Cir.), *writ denied*, 654 So. 2d 319 (La. 1995).

71. The supreme court reversed *Wheeler*, but did not question the utilization of *Lovell-Chevron*, rather, the holding of retroactivity produced by the application of *Lovell-Chevron*. The supreme court cited *Magee* in the reversal, which applied *Lovell-Chevron* to a similar factual situation, but with the opposite outcome (prospective application). Only two Justices would have granted the writ. See *Magee*, 653 So. 2d at 65 ("Jurisprudence has recognized that where a decision could produce substantial inequitable results if applied retroactively there is ample basis for avoiding the 'injustice and hardship' by a holding of nonretroactivity." *Id.* at 67).

72. One might also wish to consider the continued *non-retroactive* application of decisions in criminal law. See, e.g., *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992) (jury instruction declared unconstitutional; for a fairly recent supreme court decision which was not retroactively applied and which contains an excellent run through of criminal adjudicative retroactivity analysis in Louisiana).

73. *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 321 (5th Cir. 1999).

strongly written as the court of appeals opinion in *Hulin* and it is not clear that it would.

Criticism over the mischaracterization of Louisiana jurisprudence has nothing to do with the excellent theoretical reasoning in *Hulin*, but rather concerns the *Erie* mandate that a federal court is bound by the current interpretation of law, as formulated by the state's highest tribunal. More analysis and discussion of Louisiana's jurisprudential history definitely seemed in order.

The opinion does buttress its approach with the excellent example of the jurisprudential development of a complete body of mineral law, during which temporal issues were not raised.⁷⁴ Judge Dennis has demonstrated theoretical consistency in such cases as *Frazier v. Harper*⁷⁵ and *Ardoin v. Hartford Accident & Indem. Co.*⁷⁶ Also, portions of the *Hulin* opinion, which dealt with the U.S. Supreme Court, demonstrated that *Chevron* had been interred, which could impliedly spell an end in Louisiana to the *Lovell-Chevron* analysis.

B. Did *Hulin* Accurately Characterize the Current Stance of the U.S. Supreme Court?

In the turbulent seas of retroactivity doctrine, it appears that the Louisiana Supreme Court has often cast its anchor in the same vicinity as that of the U.S. Supreme Court.⁷⁷ Louisiana has very little explicit civilian tradition upon this topic and the fact that our courts have entertained retroactivity analysis on numerous occasions, dating back more than fifty years, points one away from a historically civilian treatment of this topic.⁷⁸

74. *Id.* (This "law" was designed to "regulate and accommodate property interests created or affected by the unforeseen phenomenon of oil and gas production.").

75. 600 So. 2d 59, 63 (La. 1992) ("[T]he judicial decisions in . . . [*Sims v. Sims* and *T.L. James & Co. v. Montgomery*] did not create law to be applied prospectively but interpreted principles of legislated law that antedated and governed the matrimonial regimes in those cases and similarly apply to the present case").

76. 360 So. 2d 1331 (La. 1978). "In deciding the issue before us the lower courts did not follow the process of referring first to the code and other legislative sources but treated language from a judicial opinion as the primary source of law." *Id.* at 1334.

77. See, e.g., *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992); *State v. Sanders*, 523 So. 2d 209 (La. 1988); *State v. St. Pierre*, 515 So. 2d 769 (La. 1987); *Succession of Clivens*, 426 So. 2d 585 (La. 1982); *Lovell v. Lovell*, 378 So. 2d 418 (La. 1979); *State v. Collum*, 365 So. 2d 1272 (La. 1978); *State v. Liesk*, 326 So. 2d 871 (La. 1976); *Jackson v. Doe*, 296 So. 2d 323 (La. 1974); *Barnett v. Develle*, 289 So. 2d 129 (La. 1974); *City of New Orleans v. Harris*, 283 So. 2d 207 (La. 1973); *State ex rel. LeBlanc v. Henderson*, 259 So. 2d 557 (La. 1972).

78. See *Succession of Lambert*, 210 La. 636, 28 So. 2d 1 (1946). See also discussion *infra* at V.C.

1. Theoretically, the U.S. Supreme Court Should be an Excellent Sounding Board for Adjudicative Retroactivity Analysis in Louisiana

The *Hulin* appellate court began its consideration of the U.S. Supreme Court doctrine with the following statement:

The Supreme Court of Louisiana, like courts of other states, gives careful attention to the United States Supreme Court's opinions explaining common-law traditions and constitutional principles that influence the role of the judiciary and the temporal effects of judicial decisions. Accordingly, we must take those opinions into account in our effort to ascertain the probable course of future developments in the Louisiana doctrine of retroactivity.⁷⁹

This is a meritorious statement. Keep in mind that most federal and state "[j]udicial decisions operate on several different kinds of law: common law, statutes, and the Constitution."⁸⁰ Segmented as such, one may push for different modes of analysis. Statutory interpretation is intended to be a declarative function, and thus there are really no theoretical temporal problems presented: "Since an unchanging statute backs the judicial interpretations, it makes sense to say that while decisions may change, the law remains the same."⁸¹ Thus the new, correct decision is always applied. At the other end of the spectrum is the common law, which has "no positive source independent of judicial decisions, [therefore] the law must change as the decisions change. Consequently, it makes sense to distinguish between old law and new law."⁸² Then there is constitutional law, which lies somewhere in the middle of the two interpretive extremes.

The high court has examined the issue of adjudicative retroactivity primarily in the context of judicial overrulings based upon constitutional and statutory interpretation and not jurisprudential shifts in the common law. Thus, although the U.S. Supreme Court purports to have examined this issue, it has only done so when its judicial decisions were closely grounded in positive law. This fits neatly with Louisiana's civilian tradition of not recognizing judicial decisions as a source of law,⁸³ as opposed to the common law concept of *stare decisis*.

There is justifiable skepticism toward Louisiana's nonrecognition of judicial decisions as law,⁸⁴ just as there is with pinpointing some of the latest "fundamental" and First Amendment rights in the immutable letters of the

79. *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 329 (5th Cir. 1999).

80. Roosevelt, *supra* note 6, at 1076.

81. *Id.*

82. *Id.* See also Shapiro, *supra* note 1, at 1 §2 (for the proposition that the common law has proven fertile ground for the topic of adjudicative retroactivity: "[T]he modern decisions, taking a more pragmatic view of the judicial function, . . . now treat the question of how an overruling decision should operate as one of judicial policy rather than of judicial power. . . ." *Id.*).

83. See La. Civ. Code art. 1: "The sources of law are legislation and custom."

84. An attorney who takes Article 1 to its logical extreme should invest heavily in malpractice insurance.

Constitution. Consider the following quote regarding the source of constitutional law in conjunction with the operation of the Louisiana judiciary, which has on occasion crafted statute-like causes of action out of Louisiana Civil Code article 2315:

Constitutional law has a positive source—the hallowed document—independent of judicial decisions. But the view that the Constitution means now what it always has, and always will, has serious difficulties. . . . [I]t is hard to keep a straight face while suggesting that the current panoply of substantive and procedural rights has always existed, or . . . that the First Amendment has always embodied its current congeries of doctrines and distinctions.⁸⁵

Comparing a creative judicial interpretation, such as that in *Halphen*, to certain forms of constitutional interpretation, seems a better analogy than comparing *Halphen* to common law formation or perhaps even statutory interpretation. Accordingly, a close examination of Supreme Court decisions might be well warranted if one is attempting to formulate a Louisiana approach to adjudicative retroactivity.

2. *Some History—Recognition of Non-retroactivity of Judicial Decisions is Born*

The general presumption in civil and common law systems is that legislation applies prospectively and judicial decisions apply prospectively and retroactively.⁸⁶ This is consistent with traditional conceptualizations of coordinate but separate branches of government and has been the basic legal norm “for near a thousand years.”⁸⁷ One scholar has suggested that “[u]ntil the 1960s, the question of retroactivity was a dog that did not bark. . . [because the courts] simply followed the general rule that a court must decide the cases before it according to the best current understanding of the law.”⁸⁸

The Warren Court ushered in change with its *Linkletter v. Walker*⁸⁹ opinion. *Linkletter* addressed the propriety of retroactive application of *Mapp v. Ohio*,⁹⁰ which held the Fourth Amendment exclusionary rule applicable to the states. The issue was whether the *Mapp* rule could be invoked by habeas petitions of those

85. Roosevelt, *supra* note 6, at 1076-77.

86. See Fisch, *supra* note 6, at 1057 (This presumption “is a matter of black letter law.” *Id.*). See also Hulin v. Fibreboard Corp., 178 F.3d 316, 319-23 (5th Cir. 1999) for a discussion of the operative norm of judicial decisions. See also La. Civ. Code art. 6.

87. Harper v. Virginia Dep’t of Taxation, 509 U.S. 86, 94, 113 S. Ct. 2510, 2516 (1993) (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372, 30 S. Ct. 140, 148 (1910) (Holmes, J., dissenting)).

88. Roosevelt, *supra* note 6, at 1117. Note that there is some dispute as to this characterization of the U.S. Supreme Court jurisprudence. This has been termed the “decision-time model,” which is discussed in greater detail in Part VI.A *infra*. But cf. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145 (1932).

89. 381 U.S. 618, 85 S. Ct. 1731 (1965).

90. 367 U.S. 643, 81 S. Ct. 1684 (1961).

convicted before the *Mapp* decision. The Court found that the effect of a subsequent ruling is subject to no set "'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations' . . . [and] in appropriate cases the Court may in the interest of justice make the rule prospective."⁹¹ Support for this decision was not unanimous, but was "backed both by Justices who saw in non-retroactivity a means to implement desired reforms without inflicting unacceptable disruption on the criminal justice system and by those who disagreed with the reforms [of such cases as *Miranda v. Arizona*⁹²] and accepted non-retroactivity as a way to limit their effect."⁹³ The U.S. Supreme Court has addressed the appropriate temporal limits of judicial overrulings in such areas as criminal procedure,⁹⁴ determination of statutes of limitations⁹⁵ and the constitutionality of certain taxes in tax refund cases.⁹⁶

3. *Searching for the Supreme Court's Current Stance*

The latest U.S. Supreme Court opinions appear to have moved in the direction of absolute retroactivity for judicial overrulings, but any attempt at deriving coherent reasoning or application will be met with disappointment. Consider that "seven Justices in *Harper* could have agreed on retroactive application of precedent without articulating an explicit rationale, [and] without reaching the substance of the retroactivity issue."⁹⁷ One legal scholar laments:

[R]ecently, the Supreme Court's recognition of the intellectual poverty of its retroactivity analysis has led to efforts to formulate a more rational analytical structure, albeit with limited success. The Court has addressed retroactivity questions on at least seven occasions in the past five years, but its decisions, rife with separate opinions, reflect a variety of conflicting and confusing approaches.⁹⁸

What is decipherable from Supreme Court jurisprudence is the emergence of three distinct temporal applications of judicial decisions after *Linkletter*. First, a

91. *Linkletter*, 381 U.S. at 627-28, 85 S. Ct. 1736-37.

92. 384 U.S. 436, 86 S. Ct. 1602 (1966).

93. Roosevelt, *supra* note 6, at 1093. It is fitting that the birth of prospective decisionmaking, which has given way to much confusion and differing opinion, was the product of such tension.

94. See *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987); *Mackey v. U.S.*, 401 U.S. 667, 91 S. Ct. 1160 (1971); *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967); *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965).

95. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S. Ct. 2617 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022 (1987); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971).

96. See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 113 S. Ct. 2510 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991); *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 110 S. Ct. 2323 (1990).

97. Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 Mo. L. Rev. 281, 301-02 (1994).

98. See Fisch, *supra* note 6, at 1058.

decision may be made fully retroactive. This is overwhelmingly the norm and reflects the declaratory theory of judicial interpretation. Second, there is the purely prospective method of overruling, in which the new rule is not applied to the parties before the court or to cases arising before that decision, but instead becomes a vehicle for announcing the new law. This approach recognizes that application of a new rule to parties who relied on the old may offend notions of justice and fairness. Finally, a court may apply a new rule in the case in which it is decided, but return to the old one for all cases predating that decision. Termed modified, or selective prospectivity, this method developed in the criminal law at a time when the Court developed new rules to insure protection of the rights of the accused and was concerned that a criminal defendant usually only seeks one thing on appeal, the reversal of his conviction.⁹⁹

In *Harper v. Virginia Dept. of Taxation*,¹⁰⁰ a state tax upon a number of federal civil service and military retirees was found unconstitutional based upon an earlier ruling in *Davis v. Michigan Dept. of Treasury*.¹⁰¹ Petitioners were seeking a refund for improperly assessed taxes from 1985-88. The state of Virginia passed legislation which attempted to mitigate these claims but did not purport to fully refund the taxes collected during the three years in question. In denying the relief requested by petitioners, the Virginia Supreme Court applied the *Chevron Oil Co. v. Huson*¹⁰² test, which had extended the question of nonretroactive application of judicial decisions outside of criminal law and into civil law. *Chevron* implemented a three factor discretionary test which was presented as the *Lovell-Chevron* test in Part IV.C.¹⁰³

Justice Thomas, joined by Justices Blackmun, Stevens, Scalia, and Souter, wrote the majority opinion in *Harper*, overruling the Virginia Supreme Court. In the process, the *Chevron* discretionary approach and selective prospectivity, in both the criminal and civil context, were interred and the viability of nonretroactive application of future Supreme Court holdings was cast in doubt:

Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule.¹⁰⁴

Justices White and Kennedy subscribed to those parts of the majority opinion which produced a retroactive application, but did not concur in the reasoning

99. See *James B. Beam Distilling Co.*, 501 U.S. at 535-38, 111 S. Ct. at 2443-44.

100. 509 U.S. 86, 113 S. Ct. 2510 (1993).

101. 489 U.S. 803, 109 S. Ct. 1500 (1989).

102. 404 U.S. 97, 92 S. Ct. 349 (1971).

103. *Chevron*, 404 U.S. at 106-07, 92 S. Ct. at 355. ("[T]here is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.").

104. *Harper*, 509 U.S. at 97, 113 S. Ct. at 2517 (internal citations omitted).

above, stating that, "Prospective overruling allows courts to respect the principle of stare decisis even when they are compelled to change the law in light of new understanding. . . . When a court promulgates a new rule of law, prospective application functions 'to avoid injustice or hardship to civil litigants who have justifiably relied on prior law.'"¹⁰⁵ But the Justices felt that in this case a new principle of law was not announced.¹⁰⁶

In a separate concurrence, Justice Scalia fought alone for a return to the Blackstonian model: "[A] judge overruling [a] . . . decision would 'not pretend to make a new law, but to vindicate the old one, from misrepresentation.'" It is not that a prior decision "was bad law, but that it was not law."¹⁰⁷

Justice O'Connor and Chief Justice Rehnquist wrote the dissent: "Today the Court applies a new rule of retroactivity to impose crushing and unnecessary liability on the States, precisely at a time when they can least afford it."¹⁰⁸ The dissenters went on to chastise the majority for its careless dicta, which they felt was intended to cast prospectivity in doubt, stating that "no decision of the Court forecloses the possibility of pure prospectivity."¹⁰⁹ In support of nonretroactive application, the dissent invoked Justice Frankfurter: "We should not indulge in the fiction that the law now announced has always been the law It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law."¹¹⁰ Alternatively, the dissent applied the *Chevron Oil* test and would have rendered a prospective application because, "[r]etroactive application of rulings that invalidate state tax laws have the potential for producing 'disruptive consequences for the State[s] and [their] citizens . . . threatening the State[s]' current operations and future plans."¹¹¹

*Reynoldsville Casket Co. v. Hyde*¹¹² is the latest case addressing adjudicative retroactivity doctrine, but provides the reader with a further twist. Petitioner, aware of the Supreme Court's current displeasure with holdings that limit the retroactive effect of judicial decisions, asked the court to examine her case "not through the lens of 'retroactivity,' but through that of 'remedy.'"¹¹³ Petitioner quoted Justice Harlan for support, "who, before *Chevron Oil*, pointed out that 'equitable considerations' such as 'reliance' might prove relevant to 'relief.'"¹¹⁴ This

105. *Id.* at 110, 113 S. Ct. at 2524 (quoting *American Trucking Ass'ns., Inc. v. Smith*, 496 U.S. 167, 197, 110 S. Ct. 2323, 2341 (1990) (plurality opinion)).

106. *Harper*, 509 U.S. at 112, 113 S. Ct. at 2526.

107. 1 W. Blackstone, *Commentaries* 69-70 (1765), quoted in *Harper*, 509 U.S. 86, 107, 113 S. Ct. 2510, 2523 (1993) (Scalia, J., concurring).

108. *Harper*, 509 U.S. at 113, 113 S. Ct. at 2526 (O'Connor, J. dissenting). The majority approach is "so rigid that it produce[s] unconscionable results." *Id.* at 117, 2528.

109. *Id.* at 115, 113 S. Ct. at 2527.

110. *Id.* at 116-17, 113 S. Ct. at 2528 (quoting *Griffin v. Illinois*, 351 U.S. 12, 26, 76 S. Ct. 585, 594 (1956)).

111. *Harper*, 509 U.S. at 129, 113 S. Ct. at 2535 (quoting *American Trucking Ass'ns., Inc. v. Smith*, 496 U.S. 167, 182, 110 S.Ct. 2323, 2333 (1990) (plurality opinion)).

112. 514 U.S. 749, 115 S. Ct. 1745 (1995).

113. *Id.* at 752, 115 S. Ct. at 1748.

114. *Id.* at 753, 115 S. Ct. at 1748 (quoting *U.S. v. Estate of Donnelly*, 397 U.S. 286, 296-97, 90

alternative argument is fairly straightforward. A court may apply an overruling decision retroactively, but deny a particular or burdensome remedy or refuse to apply any remedy at all.¹¹⁵

In *Reynoldsville*, the majority opinion acknowledged that ordinary retroactive application "may or may not, involve a further matter of remedies."¹¹⁶ But the court failed to propose any guidelines, instead offering rather generally that it "depend(s) like almost all legal issues—upon the kind of case, matter, and circumstances involved."¹¹⁷ The court then cryptically stated that the remedial issue would not be broached because this case did not present anything more than "simple reliance."¹¹⁸

Interestingly, Justice Kennedy, joined by O'Connor, noted in his concurrence that, "We do not read [the *Reynoldsville* opinion] . . . to surrender in advance our authority to decide that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions."¹¹⁹ Thus, it remains to be seen whether the door behind which the remedial approach lies will remain shut or provide an easy exit in troubling cases.

4. Which Way Do We Go—Whom Do We Follow?

One should not now doubt the confusion surrounding the adjudicative retroactivity jurisprudence of the Supreme Court. Judge Dennis states that "the persuasive influence that the United States Supreme Court's decisions have on state courts with respect to retroactivity doctrine now will weigh on the side of the rule of adjudicative retroactivity."¹²⁰ While the premise of this statement may be true, deriving a stable, coherent approach should involve reasoning which is divorced from the Court or one which favors articulations of select members of the high court.

Therefore, it is not surprising to find in the Supreme Court the portion of the *Hulin*¹²¹ opinion heavy reliance upon reasoning which most closely resembles that of Justice Scalia. His classical approach to issues involving separation of powers fits squarely into a legal framework, such as that of Louisiana, which denies judges

S. Ct. 1033, 1039 (1970)).

115. See *id.* at 754, 115 S. Ct. at 1749 (Once "a rule is found to apply 'backward,' there may then be a further issue of remedies, i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one.") (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535, 111 S. Ct. 2439 (1991) (plurality opinion of Souter, J.)).

116. *Reynoldsville*, 514 U.S. at 759, 115 S. Ct. at 1751.

117. *Id.*

118. *Id.*

119. *Id.* at 761, 115 S. Ct. at 1752. See also *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 133, 113 S. Ct. 2510, 2537 (1993), in which Justices O'Connor and Rehnquist were of the opinion that "it should be constitutionally permissible for the equities to inform the remedial inquiry."

120. *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 327 (5th Cir. 1999).

121. *Id.*

the status of lawmakers.¹²² Justice Scalia would urge that the nature of judicial review constrains the Court to apply decisions retroactively, elevating it to a constitutional mandate. But there is hardly a consensus among the majority of the Supreme Court: "In fact, despite the apparent retreat from *Chevron Oil*, a majority of the Court has never expressly recognized any constitutional limitation on adjudicative nonretroactivity."¹²³

C. *Did the Court of Appeals Accurately Characterize Civilian Theory?*

1. *Why the Strong Appeal to Civil Law in this Opinion?*

From an opinion-writing perspective, use of Louisiana's civilian roots seems a simple way to distinguish our state's methodology from the confusion that adjudicative retroactivity doctrine has generated in both the common law and in the U.S. Supreme Court. In this respect, Louisiana often finds itself in an enviable position with respect to legal reasoning, as civilian doctrine is often invoked at the leisure of a court in need of adding meat to a skeleton of an argument.¹²⁴ That is the inherent beauty of Louisiana's mixed jurisdiction status¹²⁵—jurists may borrow, compare, and assimilate the best aspects of civilian legal theory with those of the common law.

Judge Dennis argues strenuously throughout *Hulin* that Louisiana judges interpret, rather than make, law: "Under Louisiana's Constitution, the power to make substantive laws is vested exclusively in the legislature. Under the State's Constitution and Civil Code, Louisiana courts cannot make law but are bound to decide cases according to their best understanding of the law established by legislation and custom."¹²⁶ Interestingly, in *Hulin*, the Blackstonian model of adjudication espoused by Justice Scalia and perhaps loosely followed by a few

122. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), (quoted in *Harper* at 107 (Scalia, J., concurring) for his mantra that judicial interpretation is, in theory, to "'declare what the law is'—not what the law shall be"(retroactive in essence)).

123. See Fisch, *supra* note 6, at 1077. See also Justice O'Connor's dissents in: *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745 (1995); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S. Ct. 2510 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991).

124. See, e.g., *Bergeron v. Bergeron*, 492 So. 2d 1193 (La. 1986) ("Modern civilian method often calls upon the courts to develop jurisprudential precepts and techniques in the implementation of legislated law." *Id.* at 1197).

125. See A. N. Yiannopoulos, *Louisiana Civil Law: A Lost Cause?*, 54 Tul. L. Rev. 830 (1980): In the folds of Louisiana law, there has always been a niche for the civil law. Louisiana has been, and most probably will continue to be, a mixed jurisdiction. This is a blessing rather than a handicap, because Louisiana has a choice in the course of her future legal development and in the pursuit of justice for all her citizens.

Id. at 848. See also Harriet S. Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 Tul. L. Rev. 12 (1937).

126. *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 319 (5th Cir. 1999).

other justices, is merged with the Montesquian¹²⁷ model of adjudication reflected in the French civil law system. Witness the lofty convergence of these philosophies from different continents and long ago eras! Hear the cries and moans of all modern day pragmatists!

2. *Idealistic Civilian Theory*

The U.S. Fifth Circuit Court of Appeals would have made Brown and Moreau-Lislet proud,¹²⁸ given *Hulin's* heavy reliance upon the traditional civilian model of adjudication. One begins from the presupposition that judicial decisions are not law or law making, but "only evidence of what the court thinks is the law."¹²⁹ From there it is fairly easy to ascertain that "there could not be questions of conflicts in time between successive customs or successive jurisprudential rulings."¹³⁰

This conclusion may be met from two directions, which are seemingly at odds. The first pertains to the method of judicial interpretation. The declarative theory does not admit to inconsistent interpretation because the positive source (statute) is thought to contain only one correct interpretation, and thus any other previous deficient interpretation will be treated as if it never existed. The second relates to the status of interpretation. Because a judgment is nothing more "than a pure interpretation of legislation, . . . this interpretation has no authority beyond the case in which it is given" (i.e., it is not an official source of law).¹³¹ It may strike some as baffling that a mere interpretation may be empowered by the truth of its words to overcome a previous interpretation, which likewise must have at one time been thought to have contained the truest interpretation of legislation. Yet, this interpretative search for the genuine interpretation is declared to have little precedential effect or force of law. But this is probably delving into areas in which this writer has little authority to pursue and which the reader likewise has little desire.

In summation, judicial decisionmaking is by nature retroactive,¹³² but one should note that the word "retroactive" is foreign when inserted into civilian interpretive methodology.¹³³ In civilian jurisdictions the question of retroactivity

127. See generally, Andre Pouille, *Le Pouvoir Judiciaire et les Tribunaux* (1984) ("Everything begins with Montesquieu where he wrote: 'In every state there are three kinds of powers. . . . Liberty cannot survive unless the power to judge is separated from the legislative and executive powers.'" *Id.* at 20).

128. These two men were appointed by the Louisiana legislature in 1806 to prepare Louisiana's first Civil Code, now known as the Digest of 1808 or the Louisiana Civil Code of 1808.

129. Norton v. Crescent City Ice Manufacturing Co., 150 So. 855, 858 (La. 1933).

130. Paul Roubier, *Le Droit Transitoire* (Conflicts Des Lois Dans Le Temps) 23 n.7 (2d. ed. 1960) (trans. by J. R. Trahan).

131. *Id.* at 25 n.7.

132. Jacques Ghestin & Gilles Goubeaux, *Traite de Droit Civil: Introduction Generale*, at 413-14 n.460 (3d ed. 1990) (trans. by J. R. Trahan).

133. See Francois Terre, *Introduction Generale Au Droit* 247 n.228 (4th ed. 1998) (trans. by J. R. Trahan) ("More than retroactive the jurisprudence is, in the image of interpretative laws, declarative." *Id.*).

does not arise because a jurisprudential rule is applied in all new actions without any consideration of the date on which the facts underlying the action occurred. It is not a subject which can be countenanced by the theory.

3. *Theory and Practicality Collide*

Such a view has much intuitive appeal for its logical consistency, but is deficient when placed against the backdrop of modern legal reality, in which society has become increasingly regulated and legalistic.¹³⁴ Consider the thoughts of French jurists upon their own theories:

[The] contemporary doctrine has become more realistic. It has made contact with the customary formations of the jurisprudence; it sees in them, in general, a source of modern law, some would even say the sole source of modern customary law. . . . Moreover, changes in the jurisprudence are known and commented upon, just like new legislation.¹³⁵

Similarly, it is hard to imagine how one could seriously entertain that *Halphen*, with its statutory-like construction, does not represent "law," as that term is understood by modern legal scholars, including those within the civilian tradition.¹³⁶ It

134. See Mary Ann Glendon, *The Sources of Law in a Changing Legal Order*, 17 Creighton L. Rev. 663 (1984):

Civil and common law systems alike were fundamentally transformed in the transition from liberal laissez-faire governments to modern social welfare states. . . . In the process, the source of law that had distinctively characterized each legal system, and the legal methods associated with it, lost their centrality. First, case law in the common law and codes in the civil law lost ground to modern statutes . . . while civil law judges were becoming more conscious of and willing to exercise their law-making powers; finally, administrative law has encroached on all preexisting sources of law. We have entered the age of legislation triumphant, the judge militant, and bureaucracy rampant.

Id. at 682-83.

135. Roubier, *supra* note 130, at 24-25 n.7.

136. In many, if not most, contemporary civil law systems, jurisprudence is now regarded as an autonomous source of "law." See Paul Foriers, *Les Relations des Sources Exerçées et Non Ecrites du Droit*, in 2 *La Pensée Juridique De Paul Foriers* 683-85 (1982); Mary Ann Glendon et al., *Comparative Legal Traditions* 242 (2d ed. 1994); 1 Gabriel Marty & Pierre Raynaud, *Droit Civil: Introduction Generale a L'Etude du Droit* 215, 217-18 n.119 (2d ed. 1972); Michel Mialle, *Une Introduction Critique au Droit* 245-51 (1976); Boris Starck, *Droit Civil: Introduction* 51-53 nn.119-125 (1972); Alex Weill & Francois Terre, *Droit Civil: Introduction Generale* 205 n.196, 232-34 n.221 (4th ed. 1979); 1 Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law* 272-73 (1977). This development springs, in part, from a fairly recent revolution in "hermeneutics," that is the theory of understanding or interpretation. Taking their cue from hermeneutical theorists in such fields as linguistics and literary criticism, many civil law scholars maintain that jurisprudence, to the extent that it entails "interpretation," is inevitably "creative," that is, it adds something new to the text of the legislation that wasn't there before. To that extent, these scholars argue, jurisprudence is a genuine source of law, one that is independent, to at least some extent, from legislation. See, e.g., Foriers, *supra*, at 683-85 and Mialle, *supra* at 245-51.

was the focal point of immediate legal scholarship,¹³⁷ discussion and judicial decisions, and it was not until legislative action was taken that its validity and application was ever in doubt.¹³⁸ Taking the analysis in this direction is to beg the question of whether judicial decisions in Louisiana are indeed "law,"¹³⁹ which shall remain, for purposes of this paper, a rather untapped issue of grand scope. But how could one not agree that an insurance company may change its rates and coverage depending upon what test courts are applying in regards to product liability law, whether it is new legislation or a judicial interpretation of legislation? Undoubtedly, many companies arrange their operating policies, financial affairs and insurance coverage in reliance upon legal theories or judicial decisions supplied by Louisiana courts.

The French jurist Roubier noted, "It is necessary, nevertheless, to agree that there is an insurmountable obstacle [facing any attempt to limit the retroactivity of judicial decisions] in our law: it is the impossibility of determining, with sufficient precision, the moment at which the jurisprudence becomes fixed."¹⁴⁰ It is not until the jurisprudence "fixes" the interpretation of the legislation (*jurisprudence constante*) that a jurisprudential rule comes into being and relates back to when the legislation was promulgated. Of course the "insurmountable obstacle" this jurist refers to is the lack of legal recognition afforded jurisprudential law in civilian

137. See, e.g., Michelle M. Hoss, Note, *Halphen v. Johns-Manville Sales Corp.—A New Product in the Area of Products Liability*, 47 La. L. Rev. 637 (1987). See also, William E. Crawford, *Developments in the Law, 1985-86, A Faculty Symposium*, 47 La. L. Rev. 485 (1986).

138. See Louisiana Products Liability Act, La. R.S. 9:2800.51-.59 (1991).

139. Compare *State of Louisiana v. Cenac*, 132 So.2d 897 (La. App. 1st Cir. 1961), *writ denied*, 132 So. 2d 928 (La. 1961) ("We shall first consider the astounding contention of the state that this court now possesses power and authority to overrule or set aside a line of jurisprudence heretofore established, reaffirmed and reiterated by the Supreme Court. . . ." The court goes on to say this is an "utterly incredible argument." *Id.* at 899). Compare Barry Nicholas, *French Law of Contract* 14 (1982):

[W]hat we should call the law of torts, which is stated in the *Code Civil* in only five articles, is very largely a creation of the courts. The writers regularly, and increasingly, take account of *jurisprudence*; no practitioner would fail to deal with it in presenting a case. . . . The Constitutional theory that jurisprudence cannot be a legal source is, however, normally maintained. Theory and practice may be reconciled by drawing a distinction between a source (in law) and an authority (in fact). It is an obvious and important fact that courts do follow previous decisions. . . . But it is nevertheless a fact and not a rule; no court is legally required to follow any previous decision. There is no system of binding precedent, though there is a practice which produces similar results.

Id. at 15. Compare John Bell, *Comparing Precedent*, 82 Cornell L. Rev. 1243 (1997) (reviewing D. Neil MacCormick & Robert S. Summers, *Interpreting Precedents* (1997):

[R]ecently, the attitudes of Common Law and Continental Law have been drawing closer. On the Continent, statute law is making something of its primacy; lawyers no longer see decision-making as a merely technical and automatic process, but accept that the comprehensive principles laid down by statutes call for broad interpretation, and have begun to treat the *jurisprudence constante* of the courts as an independent source of law.

Id. at 1244 (quoting 1 Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* 71 (Tongweir trans., Oxford U. Press 2d rev. ed. 1987)).

140. Roubier, *supra* note 130, at 26 n.7. See also Ghestin & Goubeaux, *supra* note 132, at 414 n.460.

systems, such as may be found in the common law rule of *stare decisis*.¹⁴¹ A lack of consensus concerning the number of uniform rulings necessary to trigger *jurisprudence constante*¹⁴² and the secondary legal weight given it, may lead to imprecise observations about when and how much force judicial interpretations should be given. Thus, it will be difficult to demonstrate when the "law" changed and exactly what kind of reliance one may have upon judicial interpretations. Some French jurists lament this lack of determinability:

Nevertheless this last consideration, if it is decisive for French law, where the jurisprudence is fixed only little by little by the repetition of decisions, would have no bearing in the Anglo-Saxon countries, where thanks to the system of the authority of judicial precedent (case-law), an isolated decision of justice suffices to cause a true rule of law to appear, one that thereafter has obligatory value. One cannot, then, be surprised to see that, in these countries, some efforts have been made to stop the retroactivity of new jurisprudential rulings.¹⁴³

Of course the import of the above quote will depend upon Louisiana's treatment of precedent, an issue that proceeds lockstep with the legal status of judicial interpretation and to what extent Louisiana is either a common law or civil law jurisdiction. Once again, these are chronically debatable topics, which expand well beyond the confines of this paper.

But certainly, cases such as *Halphen* do not appear to operate in a manner consistent with *jurisprudence constante*. A cynic would likely note that Louisiana courts often seem to invoke the theory of *jurisprudence constante* when desiring to overrule judicial precedent and conversely that one opinion, especially when penned by the Louisiana Supreme Court, is almost always precedent enough. Whatever one's views, it is hard to deny that the federal system, constitutional rulings and the rule of *stare decisis* have not made some headway into Louisiana's practical use of precedent.

Similarly, if Louisiana is going to invoke the civilian approach to interpretation, which embraces absolute judicial retroactivity, then it must accept the civilian function of the judge, as the mouthpiece of the legislature, and the accompanying treatment of precedent. *Stare decisis* in the common law provides some protection against adjudicative retroactivity because of a court's strong reluctance to abandon precedent. But, in civilian systems a court may abandon a judicial interpretation if it feels that the previous court erred. On a theoretical level this may cause concern, as it could lead to less predictability in the case law, which many persons view as the "law."

141. See Black's Law Dictionary (6th ed. 1990) (*Stare decisis* is a "Doctrine that, when the court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same." *Id.* at 1406).

142. See Ghestin & Goubeaux, *supra* note 132, at 414 n.460 (*Jurisprudence constante* recognizes that authority attaches to a concordant series of decisions. It is an indirect source of positive law and emerges when the jurisprudence has fixed the interpretation of legislation).

143. Roubier, *supra* note 130, at 26 n.7.

VI. FURTHER ANALYSIS AND EXPLORATION OF ADJUDICATIVE RETROACTIVITY

A. *The Decision-Time and Transactional-Time Models*

This is a brief introduction to a new doctrinal approach which sets forth two different ways one might view the temporal effects of judicial decisions. Each functions according to its moniker. The "decision-time model" asserts that the judge is to apply the most current formulation of the law in effect at the time the decision is rendered. Thus, there is theoretically no retroactivity, as the judge will apply the most current formulation of the law, irrespective of when any events occurred. In other words, the law is not given retroactive effect, but produces a uniformly retroactive result.¹⁴⁴ The "transaction-time model" begins with "the premise that parties should be governed by the law in effect at the time of their actions."¹⁴⁵ The result is often similar to the decision-time model, since most judicial decisions are based on the most current formulation of the law. But the premise underlying this approach raises many issues (such as what constitutes "law," and what are the underlying equitable considerations and societal policies?) and has opened the door for the characterization of judicial decisions as prospective. The attendant application and reasoning behind the "transaction-time" model has become circular and muddled: "The question is thus not what law is to be applied but rather what the transaction-time law is. If the decision-time result is to be reached, it must be because decision-time law has become transaction-time law, i.e., because the new law is effective retroactively."¹⁴⁶

Though not fully explored, the leading proponent of the decision-time model asserts that it is not a completely inflexible approach. He claims that doctrines such as remedial discretion, which encompass harmless error and equitable tolling, would allow courts to reach just results without deforming retroactivity jurisprudence. As a default, he asserts that the substantive law of a particular area may provide relief.¹⁴⁷

This model is basically an emulation of the civilian and Blackstonian models of adjudication. But it attempts to take us back to a time in which these theories were irrebuttably the law by banishing the phrase "judicial retroactivity." Instead of acknowledging the problem as an outgrowth of theory colliding with practicality, the decision-time model blames the theory for getting off track.¹⁴⁸ Its consistency is logically appealing, but its assessment of the modern legal world may be lacking utility and its assertions of flexibility may turn out to be false.

144. See Roosevelt, *supra* note 6, at 1081-91 (proposing that this surprisingly simple model was the norm before the Warren Court's *Linkletter v. Walker* opinion).

145. Roosevelt, *supra* note 6, at 1078-79.

146. *Id.*, at 1080-81.

147. *Id.*, at 1089-90.

148. Think of the decision time-model as a bottom up rather than a top down approach.

B. Legal Limitations on Adjudicative Retroactivity

A major reason why the prospect of unlimited retroactivity of adjudication is not the juggernaut it might seem is that "[i]n both civil and common law systems, the fully retroactive effect of every judicial decision is barred by independent legal principles of law designed to place limits on litigation in the interest of legal stability."¹⁴⁹ History flushes out the Roman legal concept of *causae finitae* (extinguished claims), in which there were three basic operative events. An explication is provided by the juriconsult Ulpian:

A judgment puts an end to claims because one must accept that which emanates from him who has the right to judge; a compromise, because of the good faith that is attached to the validity of the act; and finally [prescription, because] consent or long silence implies the abandonment of intentions, which the new law can no longer cause to be revived."¹⁵⁰

The early development of *causae finitae* has left enduring legacies in both the common and civil law and is easily recognizable in the modern legal formulations of *res judicata* and prescription (statute of limitations).¹⁵¹ Besides the basic benefit of allowing one to continue his or her existence without an infinite specter of looming or multiplicative litigation, these legal mechanisms also neatly resolve many problems relating to conflicts of law in time.

1. Res Judicata

The operation and policy behind *res judicata* is quite simple. The only major coupling of this principle to the topic at hand is likely to be the distinction between *causa finitae* and *causa pendens* (litigation in progress). A "pending juridical situation [*causa pendens*], that is to say, one that has not been closed according to . . . [judgment, compromise, prescription (*causa finitae*)] at the time at which the new law is promulgated, will find itself submitted to the new law."¹⁵² This distinction could carry great consequences in the modern world of litigation, in which a cause of action may wind through the legal system for a number of years, extending the effect of new judicial interpretation well beyond the prescriptive period.¹⁵³ But one should keep in mind the rather obvious conclusion that "the *res judicata* consequences of a final, unappealed judgment on the merits [are not] altered on a legal principle subsequently overruled in another case."¹⁵⁴

149. *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 323 (5th Cir. 1999).

150. See Roubier, *supra* note 130, at 32 n.8.

151. See *Hulin*, 178 F.3d at 323: "In Louisiana, the principles of *res judicata* and extinguishment of rights or obligations by prescription limit the retrospective effect of retroactive legislation." *Id.*

152. Patrice Level, *Essai Sur Les Conflicts De Lois Dans Le Temps*, n. 19, at 33, fn. 47 (1959).

153. See, e.g., *Hulin v. Fibreboard Corp.*, 178 F.3d 316 (5th Cir. 1999) and *Toups v. Sears, Roebuck and Co., Inc.*, 507 So. 2d 809 (La. 1987).

154. *Cox v. Cox*, 426 So. 2d 656, 658 (La. App. 1st Cir.), *writ denied*, 430 So. 2d 99 (1983) (quoting *Federated Department Stores, Inc. v. Moittie*, 452 U.S. 394, 101 S. Ct. 2424 (1981) (Petitioner

2. Prescription

Likewise, liberative prescription is, in most cases, easy to apply to changes in the jurisprudence. If a new judicial interpretation of the Civil Code represents how the law always was, then it follows that if one's claim has prescribed in light of the new interpretation of the old law than it cannot give rise to a current cause of action. In other words, new interpretations cannot give rise to new causes of action if they are outside of the prescriptive period. Prescription may appear arbitrary and in some cases, such as when combined with a jurisprudential shift, may create the appearance of unconscionable results, as illustrated in the following hypothetical.

Theonice and Maxie are brothers who spent their last 30 years working for a sandblasting company on the Vermilion Bay. Both also happen to have smoked for the last thirty years. On January 1 Theonice is diagnosed with lung cancer and amazingly, two days later on January 3, Maxie also discovers that he has lung cancer. The two brothers consult an attorney, Claude, who tells them that he cannot take their cases because the burden of proof is too high and he just lost a similar case. On January 2 of the next year, a new jurisprudential rule is announced similar to the "per se" rule announced in *Halphen*. The lawyer immediately remembers the irate Cajun brethren and attempts to contact them. He does so, and files suit the next day, January 3, on their behalf. Theonice's suit is dismissed on an exception of prescription due to the running of one year.¹⁵⁵ But Maxie settles with the tobacco and sandblasting companies for two million dollars, due to a very real fear of the *per se* test placing this case in the hands of an unbridled jury.

The arbitrariness in the above hypothetical is very obvious and may appear patently unfair. Nevertheless, *causa finitae*, as manifested by prescription and *res judicata*, is needed to preserve some continuity and predictability in the law, counteracting such disruptive manifestations as adjudicative retroactivity. It is the point at which the cost to society overshadows that of a few unfair, isolated incidents. One can observe that within the prescriptive window, a judicial interpretation of the law may change, changing with it the law applicable to the case, such as the burden of proof or the alteration or recognition of a cause of action. Imagine the devastating effect that a new jurisprudential cause of action could have if its retroactive effect were not foreclosed by prescription. A company could face an intentional infliction of emotional distress claim for sexual harassment dating back to an era in which the term was not part of society's collective vocabulary.

But keep in mind that this window may expand beyond the typical one-year tort prescription, such as the maximum three year prescriptive period for

unsuccessfully invoked the Lovell test (judicial retroactivity) in an attempt to resurrect a prior divorce judgement based upon a shift in the treatment of the law towards military retirement benefits. The court denied retroactivity due to *res judicata*)).

155. See La. Civ. Code art. 3492.

professional malpractice (in the instance of *contra non valentem*),¹⁵⁶ the five-year liberative prescription on instruments and promissory notes¹⁵⁷ and the ten-year default rule for liberative prescription.¹⁵⁸

3. Time-Frame Torts

Difficulties also emerge when one considers time-frame torts.¹⁵⁹ The key date for determining what law applies is presumptively the date that a plaintiff's cause of action accrues, that is, once the elements of fault, causation and damage have occurred.¹⁶⁰ Superficially this is a simple task, but consider the current debate in smoking and asbestos cases, as to what sort of manifestation is necessary for a cause of action to accrue.¹⁶¹ The manifestation rule also encounters difficulty with the legal principle of *contra non valentem*.¹⁶² Therefore, it is not surprising that dissatisfaction with the manifestation rule in cases involving long-latency diseases has begun to surface.¹⁶³ The alternative would be to apply the law that was in effect when the plaintiff was exposed to the damaging substance (asbestos, cigarette smoke). This is known as the "exposure rule,"¹⁶⁴ which has not been followed in Louisiana. Nevertheless, one should be aware that in areas of law such as this, there is a latent conflict between competing theories, which could trigger adjudicative retroactivity analysis.

C. Principles Animating Analysis of Temporal Effects of Judicial Overrulings

Gleaning issues from the last forty years of retroactivity analysis is about as facile a task as spotting issues on a law school torts exam, and the divergence of opinion upon this topic should be quite apparent. Both are excellent reasons why one should be aware of the practicalities involved in order to better articulate arguments. Three basic interests typically animate discussion of the temporal limits of judicial decisions: reliance interests (fairness),¹⁶⁵ efficiency,¹⁶⁶ and the role of the judicial branch. These considerations generally vie for the majority of attention in

156. La. R.S. 9:5628 (1997).

157. See La. Civ. Code art. 3498.

158. See La. Civ. Code art. 3499.

159. See William E. Crawford & David J. Shelby, II, *Torts*, 53 La. L. Rev. 1011 (1993) (for the derivation of this term of art).

160. *Id.* at 1014-15.

161. See generally *Brown v. R.J. Reynolds Tobacco Co.*, 52 F.3d 524 (5th Cir. 1995). See also *Chustz v. R. J. Reynolds Tobacco Co.*, 961 F. Supp. 143 (M.D. La. 1996).

162. See Crawford & Shelby, *supra* note 159, at 1015 (quoting *Corsey v. State Dep't of Corrections*, 375 So. 2d 1319, 1321 (La. 1979) ("*Contra non valentem* is an exception to prescription 'where in fact and for good cause plaintiff is unable to exercise his cause of action when it accrues.'")).

163. See *Pitre v. GAF Corp.*, 705 So. 2d 1149 (La. App. 1st Cir. 1997).

164. *Id.* at 1151.

165. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S. Ct. 1897 (1969).

166. See Fisch, *supra* note 6, at 1098-99.

a legal system's choice of law, depending on its teleological leanings. If swift legal change and neutrality of the judicial branch is sought, then imposing maximum retroactivity upon judicial decisions, though not always fair and possibly at a higher social cost, would generally reflect the preferred route. Conversely, if promoting fairness and equity in the judicial system is a primary goal, then courts should be allowed to limit the retroactive effect of their decisions, leading to slower implementation of the law, but causing less disturbance and lessening the transitional costs.¹⁶⁷

It is generally observed that textualists and advocates of judicial restraint favor pure retroactivity in all judicial decisions,¹⁶⁸ while judicial activists appreciate the release that nonretroactivity may provide when attempting to bring about smoother transitions between legal regimes.¹⁶⁹ This categorization may seem counterintuitive at first, but consider how legislatures function, under a basic premise of nonretroactivity, allowing them to generally draft and implement new law with minimum disruptive effect. A court, on the other hand, functioning under a blanket of retroactivity, must carefully weigh the import of its decision, because there is little built-in tolerance for a jurisprudence that "shift[s] and spring[s]" with great ease.¹⁷⁰

Contemporaneously, many argue that imposing judicial decisions only prospectively gives them a characteristic of legislation, involving separation of powers doctrine. "Fully retroactive decisionmaking [is] considered a principal distinction between the judicial and legislative power."¹⁷¹ Judicial and legislative acts are generally distinguished in that one is a determination of existing law in relation to some existing thing or fact, while the other is a predetermination of what the law shall be for the regulation of all future cases.

Whatever side of the debate one is drawn to, one should remember that imposing every judicial decision retroactively will continue to produce difficult, seemingly inequitable, cases especially in our increasingly litigious, regulated

167. *Id.* at 1084-87.

168. See generally Justice Scalia's opinions in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745 (1995); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S. Ct. 2510 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991).

169. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991). (Prospective adjudication, as an "equitable method has its own drawback: it tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures." *Id.* at 536, 111 S. Ct. at 2444.)

170. See *James B. Beam Distilling Co.*, 501 U.S. at 543, 111 S. Ct. at 2447.

171. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 107, 113 S. Ct. 2510, 2523 (1993) (Scalia, J., concurring) (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*, § 91 (Little, Brown & Co. 1868)). See also *Harper*, 509 U.S. at 107-08, 113 S. Ct. at 2523 (Scalia, J., concurring) ("Prospective decisionmaking was known to foe and friend alike as a practical tool of judicial activism, born out of disregard for *stare decisis*. In the eyes of its enemies, the doctrine 'smacked of the legislative process'... [and] 'encroached on the prerogatives of the legislative department of government.'"). See also *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 320 (5th Cir. 1999) (quoting *Jackson v. Doe*, 296 So. 2d 323 (La. 1974) (Summers, J., concurring) ("Prospective [only] application of judicial decisions is legislating.")).

society. Recognizing this phenomena, a search for an acceptable framework will likely persist and intensify. Currently, the simplistic answer to the adjudicative retroactivity problem seems to be either that difficult cases make bad law or that petitioners out there need to accept their fate with a dose of eighteenth century legal theory.

VII. CONCLUSION

The holding in *Hulin* appears to set forth a rule of absolute retroactivity for judicial interpretation, with the exception of the phrase: "unless the rendering court specifies otherwise." There is breathing room in this statement, which may ultimately deliver *Hulin* from unfavorable treatment by the Louisiana Supreme Court. Yet, the *Hulin* court offers no guidance as to when a court may "render otherwise" and instead seems to amply demonstrate that Louisiana courts should never "render otherwise."

Suppose the Louisiana Supreme Court adopts the *Hulin* rationale as its own and we now have a legal rule of absolute retroactivity or at least an almost irrebuttable presumption of retroactivity. Do we want such a narrow rule? Wouldn't it lead to a narrowing of the judicial function and perhaps limit judicial creativity? What about the really difficult cases? How well does it comport with our mixed approach to law and precedent? Consider the function of the judiciary, as seen through the eyes of a prominent Louisiana jurist, Albert Tate:

[I]t is important for us to recognize and restate the obvious truth that the courts do possess and should exercise law-making responsibilities. By frank recognition that judicial creativity is an essential component of the process of deciding cases, we may perhaps find courage to correct the misinformation on the subject. . . . Misled by Francis Bacon's half-truth, 'Judges ought to remember that their office is . . . to interpret law, and not to make law' and by several generations of oversimplifying high school civics teachers, multitudes of our citizenry have come to believe that it is somehow improper for judges to admit to law-innovation, law-choice, or law-revision. . . . If the courts will not perform this duty, the legislatures cannot—and the reasoned development of the law and its ability to serve current needs must suffer.¹⁷²

Despite the intimations above, in the nonconstitutional, private law realm the Louisiana judiciary appears to have functioned in a rather civilian (narrow) manner. This conclusory observation is derived from the fact that Louisiana, unlike many of its common law neighbors, has almost no adjudicative retroactivity jurisprudence based upon nonconstitutional case law. The law is, in virtually all cases, "silently applied." *Hulin* is one of a few cases in which the possibility of prospectivity was raised and tellingly, the federal district court's treatment of the subject was poor. Of course it is doubtful that this development resulted from

172. Albert Tate, *The Law-Making Function of the Judge*, 28 La. L. Rev. 211 (1968).

purposeful obeisance to civilian interpretive principles and a disavowal of the common law. It more likely resulted from the backdrop of the Civil Code, which does not recognize jurisprudence as an official source of law.

What does the lack of decisions regarding temporal conflicts within nonconstitutional judicial interpretation indicate for Louisiana and the *Hulin* holding? Two things. First, Louisiana should not foreclose the possibility of *non-retroactive* holdings when it comes to constitutional overrulings. Constitutional law shifts with the mores of the country and appointment of Presidents. It does not properly fit into the microcosm of legislative and judicial congruence, as the U.S. Supreme Court is an outside force, interrupting the idealist interaction of these two bodies with a crack of the gavel. Constitutional decisions often involve intensely personal matters, such as family or criminal law, which frequently cry out in either temporal direction. Additionally, the lack of prescription in many instances, such as writs of habeas corpus, leads to further distortions of the retroactive effect. Despite the lack of a comprehensible analytical structure, maintaining the possibility of occasional prospective holdings against a presumption of retroactivity seems prudent.¹⁷³ The fact that all of Louisiana's nonretroactive holdings in the last twenty years have been constitutional in nature should reveal the functional wisdom of such an approach.

Second, and perhaps lamentably, if Louisiana is going to stand by such an absolute rule for judicial interpretation of legislation, it will have to strive after non-creativity in its holdings. Judicial activism or creativity is usually a precursor to issues of temporal conflicts.¹⁷⁴ One should be able to perceive that the more creative an interpretation, the more likely temporal disruptions will be felt, either immediately or in the event of a later reversal.¹⁷⁵ If the Louisiana judiciary is cognizant of an absolute ban on prospective decision making, it would tend to discourage opinion writing which leans towards "law-innovation."

Some persons will likely rejoice at such a proposition. But what about the "reasoned development of the law and its ability to serve current needs" and the effect this might have upon *res nova* decisionmaking? Sometimes, as with outdated, irreconcilable or silent legislation, a judge is called upon to fill in the gaps, to shore up the bulkhead, and oftentimes this calls for bold thinking. Finally, creative judicial interpretation adds color and animation to the field of law, gives crescendo to legal discourse, and often spurs the legislature to action. It is hoped

173. One should not forget that a remedial approach may be utilized in order to mitigate a harsh retroactive application. See the discussion of *Reynoldsville* in Part V.B. *infra*.

174. This usually occurs in two ways, the most obvious being a creative departure from established jurisprudence. The second begins from an original creative interpretation of legislation and then a subsequent, narrower interpretation which overrules a previous line of cases. Hypothetically, if the Louisiana Legislature had not stepped in with the LPLA, the Louisiana Supreme Court could have reversed its decision in *Halphen*; and then we may have had plaintiffs screaming that they were robbed of their previously vested cause of action.

175. See Ghestin & Goubeaux, *supra* note 132, at 414 n.460 ("[T]o the extent that the interpretation is creative, there is in fact an enrichment of the positive law that is endowed with a retroactive effect. This effect will be all the more apparent when the interpretation is more creative.").

that Louisiana's adjudicative retroactivity analysis will continue to accommodate such a need.

If one was searching for a solution which purported to address the problems accompanying adjudicative retroactivity, then one should look beyond this paper. This is a challenge for future lawyers, judges and jurists to confront and dispose of. It is hoped that these words will better equip those who choose to pursue such a task.

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